

PENNY LOU FEY,

Claimant,

v.

TIDYMAN’S, LLC,
DBA CENTRAL COUNTY MARKET,

Employer,

and

ROYAL INSURANCE COMPANY
OF AMERICA,

Surety,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

filed October 18, 2004

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted an emergency hearing in Moscow on July 28, 2004. Claimant was present in person and represented by Charles L. Graham of Moscow. Defendants were represented by Eric S. Bailey of Boise. The parties presented oral and documentary evidence. This matter was continued for the submission of simultaneous briefs, and subsequently came under advisement on October 5, 2004. There were no post-hearing depositions.

BACKGROUND

At hearing, Claimant moved to keep the evidentiary record open to accept a forthcoming response to a query regarding medical causation from Dr. Dirks. The medical opinion would presumably support her claim for compensation. Defendants objected to the admission of the opinion, arguing it would be generated post-hearing. The Referee took the matter under advisement so that the timing of the request and response could be reviewed, and to give the parties the opportunity to fully brief the matter. Both did so in their briefs.

Claimant argues the opinion should be admitted under Rule 10. G. of the Commission's Judicial Rules of Practice and Procedure because it is a medical report, and that a liberal construction of the Rule in her favor would allow the admission of the report. Defendants counter the opinion was generated after the hearing, and that it should be excluded under Rule 10. G.

Documents submitted to the Commission after the hearing indicate Claimant requested either a yes or no checkmark answer to the medical causation question in a letter dated July 28, 2004, the day of the hearing. The letter was presumably sent by facsimile transmission to Dr. Dirks sometime that day. Dr. Dirks indicated his answer with a checkmark and signed the letter on July 31, 2004. The letter was then returned by Dr. Dirks' office to Claimant via facsimile transmission on August 3, 2004, and provided to Defendants later that day.

Rule 10. G. provides in pertinent part that any medical report existing prior to the time of hearing, signed and dated by a physician, may be offered for admission as evidence at the hearing. The medical causation opinion of Dr. Dirks was clearly prepared after the hearing in this matter. Defendants' objection is SUSTAINED. The July 31, 2004, medical opinion of Dr. Dirks is not part of the record.

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ISSUES

The noticed issues to be resolved are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;
2. Whether Claimant suffered a personal injury arising out of and in the course of employment;
3. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;
4. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof; and,
5. Whether Claimant is entitled to temporary partial or temporary total disability (TPD/TTD) benefits, and the extent thereof.

ARGUMENTS OF THE PARTIES

Claimant maintains she told Kyle Parkins on February 24, 2004, that she hurt her back and needed to get some ibuprofen, and that she told Trevor Groseclose early the following morning that she was going to the emergency room because she had hurt her back the previous day. Both were co-workers in supervisory positions. Claimant argues these conversations constitute actual knowledge to Employer that she herniated a disk in her low back while mopping around her check-stand the morning of February 24, 2004. She further argues her testimony, and Dr. Dirks' chart notes of April 9, 2004, are sufficient to establish medical causation, and that Dr. Dirks' July 31, 2004, response resolves any doubt. Claimant seeks the cost of the medical care she received to treat

her low back condition, including the cost of the surgery Dr. Dirks performed and the cost of the physical therapy he recommended, and time-loss benefits during her period of recovery.

Defendants argue Claimant did not suffer an industrial accident on February 24, 2004. They cite the medical records generated contemporaneously with the date of the alleged injury which they maintain do not mention any such accident and consequent injury. Defendants further argue Claimant decided to make her lower back condition a workers' compensation claim after learning Employer's health care provider would only cover one-half of the costs associated with the back surgery performed by Dr. Dirks. They cite her attempts to change the chart notes of Dr. Miller and Dr. Brown to reflect that her back condition was industrially related.

Defendants also argue they did not receive notice of the industrial accident until May 26, 2004, well after the expiration of the statutory 60 day time limit. They further argue Claimant has changed her story on whether she informed Mr. Parkins about her injury, and that if she told Mr. Groseclose, he would have reported the reason for her absence to management, and that he should have remembered the conversation because he was the chairman of Employer's safety committee. Defendants also argue Claimant's ambiguous statements about having problems with her back are insufficient to constitute notice of an accident and injury. They ask the Commission to deny Claimant's request for compensation.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and her spouse, Jeremy P. Fey, and that of Employer's witnesses Colleen M. Gettings and Trevor Groseclose taken at the July 28, 2004, hearing;
2. Claimant's Exhibits C1 through C5 admitted at the hearing;

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3. Defendants' Exhibits D1 through D7 admitted at the hearing; and,
4. The deposition of Claimant taken by Defendants on June 29, 2004.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant began her shift as a cashier at Employer's Moscow grocery store at 6:00 a.m. on February 24, 2004. In addition to her duties as a cashier, Claimant also performed general clean-up work, primarily the area around her checkstand, and stocked shelves and racks. The work was full-time; she was paid \$6.40 per hour.

2. Sometime between 7:30 a.m. and 8:00 a.m. that morning, while mopping the area around her check-stand, Claimant stated she felt a sharp pain in her back, and numbness and tingling down her right leg. Deciding she could not mop any further, Claimant dumped the mop bucket and returned to her check stand. Claimant further stated the pain and numbness continued all day, and that she had not been previously treated for a back problem.

3. The medical records indicate Claimant was treated for low back pain in 1996 after her vehicle was struck from behind by another in a motor vehicle accident. She was prescribed anti-inflammatory and pain medications, and underwent a course of physical therapy. Lumbar spine x-rays taken at the time were within normal limits. Based on the lack of additional treatment, it would appear the diagnosed soft tissue injury resolved.

4. Claimant completed her shift at 2:00 p.m. that afternoon, picked up her son at his daycare facility, and went home. At hearing, she stated prior to leaving the store she told Kyle Parkins, Employer's front end supervisor, that she had hurt her back while mopping earlier in the

day. The statement was contrary to her deposition testimony when she stated she had not told Mr. Parkins, or anyone else, about the alleged industrial injury prior to leaving the store that day.

5. Claimant stated after arriving home she took a pain medication and laid down, but continued to have a lot of shooting pain down her right leg.

6. Between 7:00 p.m. and 7:30 p.m. that evening, Claimant bent over to get a pair of socks out of a laundry basket to wear because her feet were cold. She stated “that’s when it really went again.” Transcript, p. 20. Claimant further stated she believed she had a pulled muscle, and that she just needed to rest.

7. Claimant was taken to the emergency room at Gritman Medical Center (GMC) in Moscow by her spouse early on the morning of February 25, 2004, complaining of pain. She was seen at 5:30 a.m. by Lon G. Miller, M.D., the physician on duty.

8. Prior to leaving her residence for GMC, Claimant telephoned Trevor Groseclose, the pricing coordinator at Employer’s grocery store. The call was made between 4:00 a.m. and 4:30 a.m. Claimant stated she told Mr. Groseclose she hurt her back while mopping the previous day, and that she was going to the emergency room.

9. Mr. Groseclose does not recall taking the telephone call from Claimant. He was not aware Claimant alleged she had injured her back while mopping at work until he was contacted by a Surety representative at some unknown point, possibly in April 2004. At the time of the alleged industrial injury, Mr. Groseclose was chairman of Employer’s safety committee and aware of the procedures to be followed in the reporting of an industrial accident.

10. Dr. Miller’s chart notes indicate Claimant bent over and had sudden pain in the right low back down into her hip and leg to her knee. He further noted she had no history of a previous

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similar event, and that there was no history of recent trauma. Dr. Miller diagnosed acute sciatica, prescribed pain medications, restricted Claimant from working for one week, and instructed her to follow-up with John B. Brown, III, M.D., her personal physician.

11. Claimant instructed GMC to bill her group health plan with Employer for her treatment in the emergency room.

12. Claimant's spouse dropped off the work release at Employer's store. He gave no indication Claimant's low back condition was work related. A copy of the release is not contained in the record; its exact wording is unknown.

13. Claimant's immediate supervisor, Colleen Gettings, Employer's front end manager, stated that on the morning of February 25, 2004, she found a note on her computer indicating Claimant was sick and would not be coming into work that day. Ms. Gettings further testified she was not aware Claimant had filed a workers' compensation claim until she was questioned by a Surety representative at some unknown time several months later, possibly in April 2004.

14. Claimant saw Dr. Brown on March 2, 2004. He noted she had been seen in the emergency room for an episode of sciatica, and that she was bending over to pick up a sock and had a sudden sharp stabbing pain down her right leg with a little bit of numbness. Dr. Brown further noted Claimant had not experienced this type of incident before, that she was feeling better, but that she still had some radicular symptoms down the right leg in a L4, L5 distribution. He prescribed anti-inflammatory and pain medications, and ordered a MRI.

15. Ms. Gettings terminated Claimant during a telephone conversation on March 4, 2004. She was discharged for excessive absences during her probationary period; the absences occurred prior to her alleged industrial injury. Nothing was said concerning Claimant's back condition during

the conversation. Claimant stated she had completed her shift on February 24, 2004, because she was concerned about the amount of time she had previously missed from work.

16. On March 8, 2004, Dr. Brown noted Claimant's low back pain was getting worse. He noted mild paraspinal muscle spasm in the low lumbar region. Dr. Brown also characterized Claimant's low back pain as chronic.

17. The lumbar spine MRI ordered by Dr. Brown was conducted on March 8, 2004. It showed a large dorsal right lateral disk herniation at L5-S1 encroaching upon the exiting right L5 and descending right S1 nerve roots. X-rays of the lumbar spine were also taken. They showed moderate degenerative disk changes at L5-S1. Both tests were conducted at GMC and read by C. Reisenauer, M.D.

18. Claimant returned to Dr. Brown on March 10, 2004. He noted the results of the radiographic studies, opined the objective findings correlated to her subjective pain complaints, and referred her to Bret A. Dirks, M.D., a Coeur d'Alene neurosurgeon.

19. On March 12, 2004, Dr. Brown restricted Claimant from working until April 9, 2004, due to a large herniated disk in her back.

20. Claimant saw Dr. Dirks on April 9, 2004, for a neurological evaluation and consultation. He noted Claimant had been sweeping and mopping at work, and that she had aching in her back with some tingling into her leg. Dr. Dirks further noted, that on the evening of February 24, 2004, while at home, Claimant bent over to pick up some socks and experienced severe back pain radiating down both her legs, right greater than left. He opined her right radiculopathy correlated to the MRI findings of a large disk extrusion eccentric to the right at L5-S1. Due to the size of the herniation and resulting impingement, Dr. Dirks recommended surgical intervention.

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21. On May 10, 2004, Dr. Dirks performed a right L5-S1 laminotomy and microdiscectomy on Claimant.

22. Claimant's attorney filled out a Form 1 on May 18, 2004. It was filed with the Commission on May 21, 2004. This was the first written notice Defendants received of Claimant's low back injury and alleged February 24, 2004, industrial injury.

23. Claimant filed a Complaint with the Commission on May 24, 2004. It indicated oral notice of the alleged industrial injury was given to Mr. Groseclose on February 25, 2004.

24. Claimant last saw Dr. Dirks on June 15, 2004. He noted her strength was adequate, and that she was ambulatory. Dr. Dirks also prescribed physical therapy.

25. Claimant returned to Dr. Miller on July 7, 2004. She requested he add historical information to her February 25, 2004, emergency room chart notes; he did so. The new information indicated Claimant had felt discomfort in her right lower back and down into her hip while mopping the floor at Employer's grocery store, that she finished her shift, that OTC medications did not relieve her pain, and that after a sleepless night she presented at the emergency room. There is no mention of any bending incident.

26. In an addendum to his March 2, 2004, chart note dated July 20, 2004, Dr. Brown noted Claimant had had chronic back pain for several weeks, especially while mopping and sweeping, prior to the episode where she bent over and had a sudden exacerbation. Claimant had requested the addendum.

27. Claimant is not a credible witness.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of

the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Injury/Accident (Causation).** The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

The medical records admitted into evidence in this matter reflect Claimant suffers from a

herniated disk at L5-S1. She first sought medical attention for the herniation at the GMC emergency room early on the morning of February 25, 2004. Dr. Miller, the physician on duty, noted Claimant had bent over and felt sudden pain in her right lower back down to her knee. There is no indication in the chart note when or where Claimant bent over. Dr. Miller instructed her to follow-up with Dr. Brown, her personal physician. Claimant did so on March 2, 2004. Dr. Brown noted Claimant was bending over to pick up a sock when she felt a sudden sharp stabbing pain down her right leg with a little bit of numbness. After a MRI showed the herniated disc, Dr. Brown referred her to Dr. Dirks for a neurological consultation. In his April 9, 2004, chart note, Dr. Dirks indicated Claimant had experienced aching in her back while sweeping and mopping at work, but that on the evening of February 24, 2004, she had bent over to pick up some socks and experienced severe back pain radiating down both her legs, right greater than left. Surgery followed on May 10, 2004.

During July 2004, Claimant asked Dr. Miller and Dr. Brown to add historical data to their to chart notes. Dr. Miller added information about Claimant feeling discomfort in her right lower back and down into her hip while mopping the floor at Employer's store the day before her emergency room visit. Dr. Brown's addendum noted Claimant had been experiencing chronic back pain for several weeks, especially while mopping and sweeping, prior to the episode where she bent over and had a sudden exacerbation. Dr. Brown had previously noted the bending over incident occurred when Claimant bent over to pick up a sock.

After carefully reviewing the medical evidence contained in the record, the Referee concludes Claimant has not demonstrated to a reasonable degree of medical probability that her herniated L5-S1 disk was incurred in an alleged February 24, 2004, industrial accident. The collective opinions of the physicians involved in this matter do not support the assertion Claimant

herniated a disk while mopping the floor at Employer's grocery store on February 24, 2004; rather, they point to an incident where Claimant bent over to pick up some socks later that evening as the cause of the herniation.

2. **Remaining Issues.** Based on the above conclusion, the remaining issues before the Commission in this matter are moot.

CONCLUSIONS OF LAW

1. Claimant has not demonstrated that her herniated L5-S1 disk was incurred in an alleged February 24, 2004, industrial accident.

2. The remaining issues before the Commission in this matter are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 6th day of October, 2004.

INDUSTRIAL COMMISSION

_____/s/_____
Robert D. Barclay
Chief Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____18th__ day of ____October____, 2004, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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